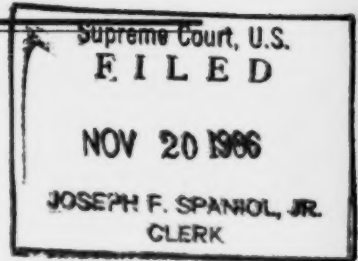


86-816

①

No. 85-5291



in the
Supreme Court
of the
United States

October Term, 1986

NANCY ANDRE HICKS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS, ELEVENTH CIRCUIT

MICHAEL D. GELETY
1700 East Las Olas Boulevard
Suite 300
Ft. Lauderdale, Fla. 33301
(305) 462-4600

Counsel for Petitioner

3712



QUESTIONS PRESENTED FOR REVIEW

I

CAN THE GOVERNMENT ACTIVELY AND CONTINUOUSLY UTILIZE AND EXPLOIT A WILLING INFORMANT-AT-LARGE IN BOTH SPECIFIC AND GENERAL INVESTIGATIONS, RECEIVING INFORMATION AND JAILHOUSE CONFESSIONS FROM SUCH INFORMANT, YET DISAVOW THE USE OF SUCH INFORMANT, CATAGORIZING SUCH JAILHOUSE CONFESSIONS AS FORTUITOUS, GAINED THROUGH LUCK OR HAPPENSTANCE.

II

CAN THE JAILHOUSE CONFESSIONS SPECIFICALLY ELICITED BY AN ACTIVE INFORMANT BE ADMITTED AGAINST A DEFENDANT ALTHOUGH THE INFORMANT HAD BEEN WORKING ON A SPECIFIC INVESTIGATION FOR YEARS, AND ALTHOUGH THE DEFENDANT INVOLVED WAS SEEN AS A PART AND MEMBER OF THAT INVESTIGATION.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PREFACE	iv
OPINIONS BELOW	iv
JURISDICTION OF THIS COURT	v
CONSTITUTIONAL AMENDMENTS INVOLVED	v
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Pages
<i>Kuhlmann v. Wilson</i> , ____ U.S. ____; 106 S.Ct. 2616 91 L.Ed.2d. 364 (1986)	3, 5
<i>Maine v. Moulton</i> , ____ U.S. ____; 106 S.Ct. 447 88 L.Ed.2d. 481 (1985)	4, 5
<i>Massiah v. United States</i> , 377 U.S. 201, 54 S.Ct. 1199 12 L.Ed.2d. 246 (1964)	4, 5
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602 16 L.Ed.2d. 694 (1966)	1
<i>United States v. Henry</i> , 447 U.S. 264, 100 S.Ct. 2183 65 L.Ed.2d. 115 (1980)	4, 5
<i>United States v. Sampol</i> , 636 F.2d. 621 (U.S.D.C. 1980)	3, 6, 7, 9

OTHER AUTHORITIES:

28 U.S.C. §1254(1)	v
28 U.S.C. §1291	3
VI Amendment, United States Constitution	v, 5, 9
Supreme Court Rules 17-23	v

PREFACE

The Petitioner, Nancy Andre Hicks, was the Defendant in the United States District Court, Southern District of Florida, and the Appellant in the United States Circuit Court of Appeals, Eleventh Circuit. The Respondent, United States of America, was the Plaintiff in the Southern District of Florida, and was the Appellee in the Eleventh Circuit Court of Appeals.

In this brief, the parties will be referred to as they appear before this Court: Petitioner Hicks and Respondent or United States.

References in this brief to portions of the record will be cited under the original listing in the record on appeal: example, Tr. Vol. I, pg. 15, as well as listing page in the attached Appendix: example, A 6.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals in the instant matter was rendered on September 3, 1986, and is reproduced in the Petitioner's Appendix, pages 1 through 7. Petitioner's Motion for Rehearing was denied by the Eleventh Circuit Court of Appeals on October 23, 1986. (A 8). An Order denying Petitioner's Motion to Suppress and Exclude Statements made to a jailhouse informant was entered on July 16, 1984. (A 9-11).

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Eleventh Circuit Court of Appeals in the United States to be reviewed by this Court were issued on September 3, 1986, with a timely Petition for Rehearing being denied on October 23, 1986.

In that section, the jurisdiction of this Court is invoked, made and conferred under Title 28 U.S.C. §1254(1) and this Court's Rules 17 through 23.

CONSTITUTIONAL AMENDMENTS INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner HICKS was arrested on a boat in the custom waters off Miami on October 28, 1981, along with co-defendant Jack Murphy. When approximately two (2) kilograms of cocaine were also discovered on the boat, Petitioner HICKS and Murphy were advised of their constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d. 694 (1966), and Petitioner HICKS clearly and repeatedly exercised her right to remain silent and her right to an attorney.

After being processed, Petitioner HICKS was moved to the North Dade Detention facility in Miami where she came in contact with Marilyn West Armstrong, who was also incarcerated.

Marilyn West Armstrong (West) worked as general manager for Aviation Activities Corporation, a corporation owned by George Morales. As such general manager, West did a great deal of business in Bimini, Bahamas, and in fact traveled to Bimini at least once a month, where West met Tony Stewart, Morales' "man in Bimini". While West worked for Aviation Activities Corporation and George Morales she became aware of a Drug Enforcement Administration investigation of the activities of Morales/Aviation and ten to twenty persons associated with this group. Having learned of the DEA investigation of Morales/Aviation, West became a government informant, supplying DEA, specifically Agent Francar, with tremendous amounts of information regarding the investigation. It was also during this period of time (beginning the fall of 1979), while West worked for Morales/Aviation and for the DEA, that West met

Petitioner HICKS, in Bimini, through Morales' man in Bimini—Tony Stewart. Of the ten to twenty persons involved in the investigation by the DEA which related to Morales/Aviation, only Morales and Stewart were specifically named in West's testimony.

Finding herself in custody with Petitioner HICKS on October 29, 1981, West immediately began to ingratiate herself upon Petitioner HICKS, reminding HICKS of their earlier meeting in Bimini through their common friend Tony Stewart, and eventually actively questioning Petitioner HICKS about the circumstances surrounding her arrest, going so far as to suggest that Petitioner HICKS use a "common carrier defense" and eventually eliciting an uncounseled statement from Petitioner HICKS regarding the cocaine in question and also mentioning Tony Stewart and a person named Kaki. Of course, these admissions were related to DEA Agent Francar by West.

At the hearing on the Motion to Suppress such uncounseled statements, the startling background of West came to light. During a rather unbroken string of criminal offenses dating back to 1969, West became associated with an agent of the Drug Enforcement Administration in 1979. She then worked for various law enforcement agencies (including the Florida Department of Law Enforcement and the Secret Service) and, by her own admission, West has worked continuously as a DEA agent from at least 1979 until the present time. Even more compelling is the fact that, during the period of time from 1979, despite various other assignments, West worked the Morales/Aviation investigation for the DEA continuously from the fall of

1979, reporting to the DEA at least twice a week and sometimes on a daily basis regarding that investigation and disseminating tremendous amounts of information during that period of time.

West was permitted to testify as to the statements which she elicited from the Petitioner in the United States District Court, and it was this devastating evidence which was the focus of the government's case and which directly led to the conviction and six year prison sentence being imposed upon the Petitioner. The Eleventh Circuit Court of Appeals, having jurisdiction under 28 U.S.C. §1291, Affirmed the District Court in the admission of the statements involved, in direct conflict with the decision in *United States v. Sampol*, 636 F.2d. 621 (U.S.D.C. 1980).

REASONS FOR GRANTING THE WRIT

In the Opinion Affirming the conviction in the instant matter, the Eleventh Circuit emphasized that West was incarcerated with the Petitioner by "luck or happenstance" and that West, of her own volition, reported incriminating statements to the government. This emphasis by the Eleventh Circuit is drawn from this Court's most recent decision on the subject in *Kuhlmann v. Wilson*, ____ U.S. ____; 106 S.Ct. 2616, 91 L.Ed. 2d. 364 (1986). The Opinion in *Kuhlman* dealt with an informant who was placed in a cell with Wilson specifically being instructed to keep his ears open and listen for information regarding co-defendants, with such information to be reported to a police officer. The *Kuhlman* decision centered upon the unanswered question of whether or not jailhouse confessions were admissible when learned by informants

who were "placed in close proximity but made no effort to stimulate conversation about the crime charged". *Id.*, page 2628. In the Opinion, this Court noted that in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 2d. 246 (1964), the informant involved was a co-defendant who was instructed to engage Massiah in conversation relating to the crimes involved. Of course, this Court found that the resultant statements of Massiah were deliberately elicited through the use of investigative techniques that were the equivalent to indirect and surreptitious interrogations.

Later, in *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed. 2d. 115 (1980), this Court found a jailhouse confession inadmissible because the informant involved had engaged the defendant in the conversation and developed a relationship of trust and confidence with the defendant such that the defendant would reveal incriminating information. This was seen by this Court as being an attempt by the government to deliberately use the informant's position to secure incriminating information without counsel being present. Again, indirect and surreptitious interrogation was found to be present, as the informant stimulated conversation and elicited incriminating information. In *Maine v. Moulton*, ____ U.S. ____; 106 S.Ct. 477, 88 L.Ed. 2d. 481 (1985), a co-defendant's engaging the defendant in conversation to ensure incriminating statements was again found to be the functional equivalent of interrogation, with the Court significantly emphasizing that the relationship between Moulton and the now-informing co-defendant was certain to elicit incriminating statements. This Court found that relationship between the confessing defendant and the cooperating informant to be very

important, and it is significant to note that in *Massiah*, *Henry*, and *Moulton*, this personal relationship, to varying extents, existed and directly led to the statements in question—as it did in the instant case with West rekindling her relationship with the Petitioner HICKS.

When this Court shifted its attention to a passive jailhouse informant in *Kuhlmann*, the emphasis upon luck or happenstance in the obtaining of a confession became justified. The Petitioner recognizes this Court's clear and recent statement that

The Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements after the right to counsel has attached (cites omitted), a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the Defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. *Kuhlman*, Pg. 2630.

A clear distinction was drawn by this Court between active participation by an informant and mere passive listening that results in a fortuitous statement being overheard. Unfortunately, the Eleventh Circuit Court of Appeals misapprehends this distinction and improperly applies the test set forth in *Kuhlmann* to the case of the Petitioner HICKS. This Court in *Kuhlmann* stated that a defendant does not make out a violation of the

right to counsel simply by showing that an informant, through prior arrangement or voluntarily, reported incriminating statements to the police. However, this specifically dealt with, in context, the informant who did not actively engage the defendant in conversation or in any way elicit incriminating statements from the defendant. The Eleventh Circuit applied the previously quoted caution to the instant matter where it was clear that West did have a personal relationship with the Defendant and used that personal relationship in questioning and actively eliciting statements from Petitioner HICKS. Certainly, West did take action beyond merely listening, and that action was specifically designed to deliberately elicit statements from HICKS. This misapplication takes on important dimensions when it is further remembered that West was actively working as an agent for many years and, more importantly, was actively working in a specific investigation regarding Morales/Aviation and Tony Stewart—the person who introduced West to Petitioner HICKS. West was actively working this investigation, saw HICKS as one of the “ten to twenty” persons involved in the investigation, and set about to circumvent Petitioner’s right to counsel in gaining admissions from Petitioner HICKS.

Separate and distinct from the active investigation and the deliberate efforts by informant West and her supervising DEA Agent, is the fact that West was and remains the ultimate informant-at-large as was discussed in *United States v. Sampol*, supra. It is absolutely beyond logic to take a woman who admits being an agent for various law enforcement departments for years before the event in question, who admits being a non-stop agent working not only on one major case, but on other

various cases (supplying information as it is learned) and then have the government somehow try to disavow knowledge of and control over (and responsibility for) such agent. As in *Sampol*, West was, for whatever reason, more than eager to work as a government agent and to supply large amounts of information to the government. Similarly, the various government agencies, specifically the DEA, were equally glad and grateful to receive the various forms of information on the various cases that West supplied. When the Opinion of the Eleventh Circuit states that West was not asked by the government to gather information while in custody, nor did the government pay or promise anything in return (page App. 8), this is an artificial attempt to avoid the controlling legal standards set forth in *Sampol*. First of all, this is not an accurate reflection of the situation, as West was and continued to work the ongoing investigation regarding Morales/Aviation and the ten to twenty persons. It would be ludicrous to draw any significance from the fact that there may not have been, on that particular day, a specific instruction to continue in her efforts. West had been collecting information for approximately two years before meeting Petitioner HICKS again, and hoped that her cooperation in this and other cases would lead to some favorable treatment in West's criminal career. From any angle of review, West was indeed an informant-at-large, actively investigating any and all cases and eagerly reporting the results of her investigations to the appropriate law enforcement agencies, specifically the Drug Enforcement Administration. It is therefore inescapable that a patent conflict exists between the Eleventh Circuit Opinion in the instant matter and that Opinion in *United States v. Sampol*, and not only must that conflict be resolved, but it is of

great public interest for the proper administration of justice that this matter regarding the use of jailhouse confessions be resolved with a clear statement by this Court.

CONCLUSION

It is of great public importance for the proper administration of justice that this Court address and resolve questions dealing with the active participation and the active eliciting of jailhouse confessions by an informant-at-large, that being a cooperating person who actively ferrets out and elicits information from incarcerated persons, without the intervention of counsel. Further, the specific conflict between the instant case and *United States v. Sampol*, supra, must be resolved dealing with not only the definitions of an informant-at-large in the jailhouse confession context, but also dealing with the parameters of acceptable activity on the part of such informants.

Finally, this Court needs to address and to resolve the attempted circumvention of the Sixth Amendment right to counsel on the part of government law enforcement agencies in the practice of cultivating and using an active jailhouse informant, encouraging and sanctioning the activities of such informant in gleaning jailhouse statements, and then attempting to avoid suppression

of such statements by blanketly disavowing responsibility for such informant due to the lack of technical or specific instructions regarding a particular defendant involved.

Respectfully submitted,

MICHAEL D. GELETY
1700 East Las Olas Boulevard
Suite 300
Ft. Lauderdale, Fla. 33301
(305) 462-4600

Attorney for Petitioner

Appendix



INDEX TO APPENDIX

	PAGE
United States Court of Appeals Eleventh Circuit Opinion issued September 3, 1986	2-15
Order denying Rehearing issued October 23, 1986	16
United States District Court Southern District of Florida Order Denying Motion to Suppress issued July 16, 1984	17-19

UNITED STATES of America.

Plaintiff-Appellee,

v.

Nancy HICKS,

Defendant-Appellant.

No. 85-5291.

United States Court of Appeals,
Eleventh Circuit.

Sept. 3, 1986.

Defendant was convicted in the United States District Court for the Southern District of Florida, No. 83-997, Eugene P. Spellman, J., of cocaine-related offenses, and she appealed. The Court of Appeals, Hill, Circuit Judge, held that: (1) defendant's jailhouse statements were not elicited in violation of Sixth Amendment; (2) delay in prosecution did not deny defendant due process; and (3) district judge did not abuse his discretion in admitting evidence of extrinsic offenses.

Affirmed.

See also 611 F.Supp. 497.

1. Criminal Law —517.2(1)

Defendant's confession to casual acquaintance with whom she was fortuitously incarcerated after being arrested for cocaine-related offenses was not elicited in violation of defendant's Sixth Amendment right to counsel,

though acquaintance was government informant and defendant had invoked right to counsel, where acquaintances reported defendant's incriminating statement of her own volition. U.S.C.A. Const.Amend. 6.

2. Constitutional Law —265

Criminal Law —577.14

Sixth Amendment right to speedy trial does not apply when Government, acting in good faith, voluntarily dismisses charges; instead, delay between dismissal of earlier charges and subsequent arrest or indictment must be scrutinized under due process clause. U.S.C.A. Const.Amend. 6, 14.

3. Constitutional Law —265

Defendant charged with cocaine-related offenses was not prejudiced by delay between original indictment which was dismissed and subsequent indictment on same charges, and thus defendant was not denied due process by delay, though defendant claimed she was prejudiced because Government intentionally used delay to secure indictment against potential defense witness, who became fugitive and refused to come to country to testify for defendant. U.S.C.A. Const.Amend. 14.

4. Criminal Law —371(1)

District Court did not abuse its discretion in permitting drug enforcement administration agent to testify that various notations in defendant's diary reflected drug transactions involving small quantities of cocaine,

to show intent in prosecution of cocaine-related offenses, despite passing of four months between extrinsic and charged offenses, in light of similarity among offenses and Government's need for evidence of intent. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Florida.

Before HILL and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

HILL, Circuit Judge:

Appellant appeals her conviction of cocaine-related offenses on three grounds: (1) that her jailhouse statements were elicited in violation of the Sixth Amendment; (2) denial of her right to a speedy trial; and (3) improper admission of extrinsic offense evidence.

FACTS

Appellant and her former co-defendant were stopped by a customs patrol boat several miles south of Miami Beach on October 28, 1981. The customs officers searched the ship and seized approximately five pounds of cocaine along with appellant's diary. Upon arrest, appellant was advised of her *Miranda* rights; she indicated that she wanted an attorney and wished to remain silent. After arrest and processing, appellant was sent to the Dade County Women's Annex where she encountered Marolyn West Armstrong ("West"). West was also in federal custody having surrendered herself on a parole

violation matter stemming from prior unrelated federal convictions. The two women had been introduced to each other in Bimini, earlier in 1981, by a man named Tony Stewart. They first spoke to each other in the holding cell and continued to converse after transfer to the Women's Annex where appellant made a "jailhouse confession" to West.

Appellant's attorney learned of the jailhouse confession shortly before the pretrial hearings and filed a motion to suppress. The magistrate ordered the government to disclose the identity of the informant. The government dismissed the indictment in January, 1982, in lieu of revealing West's identity, and reindicted appellant on the same charges in December, 1983.

I.

[1] Appellant claims that West's testimony regarding her jailhouse statements should have been excluded because they were elicited in violation of her sixth amendment right to counsel. A defendant's right to exclude confessions elicited by government informants in the absence of counsel, once the right to counsel has attached and been asserted, is governed by *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), and *Maine v. Moulton*, ___ U.S. ___, 106 S.Ct. 477, 88 L.Ed.2d 281 (1985). In *Massiah*, the seminal case in this area, the Supreme Court held that the sixth amendment right to counsel applies to "extrajudicial settings" and "that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents

had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah*, 377 U.S. at 206, 84 S.Ct. at 1203. In *Henry*, the Court found that when the government instructs a fellow inmate to listen for damaging statements made by an accused in custody, it violates the accused's sixth amendment right to counsel by intentionally creating a situation likely to induce the accused to make incriminating statements without the assistance of counsel, *Henry*, 447 U.S. at 274, 100 S.Ct. at 2188-89.

The Supreme Court recently addressed this issue in *Maine vs. Moulton*, ____ U.S. ____, 106 S.Ct. 477, 488, 88 L.Ed.2d 481 (1985), where the Court affirmed the suppression of taped conversations between the defendant and his former codefendant, who was cooperating with the police. After summarizing the principal right to counsel decisions, particularly *Massiah* and *Henry*, the Court explained the nature of the right recognized in those cases:

The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. . . . [T]his guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after

the right to counsel has attached. See *Henry*, 447 U.S., at 276, 100 S.Ct., at 2189 (POWELL, J., concurring). However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Moulton, 106 S.Ct. at 487 (footnote omitted).

This case does not involve either intentional creation or knowing exploitation of an opportunity to confront appellant without her counsel. Instead, the government fortuitously received appellant's statements. The following testimony regarding West's status was given at various pre-trial hearings or at trial: West had been working as a government informant beginning in late 1979 or early 1980. At this time she went into federal custody, West was working on an investigation involving, *inter alia*, her employer Aviation Activities, Inc., George Morales and Tony Stewart. Nevertheless, West was not deliberately planted in custody to obtain information about any person nor was she instructed to gather information while in custody. Moreover, the government did not knowingly exploit her presence in jail; West did not contact agent Francar, with whom she was cooperating on the Morales/Aviation Activities investigation, until several days after her conversation with appellant, and agent DeGaglia, who was investigating appellant's case,

did not learn of appellant's statement until some time later.

Appellant claims that West was, for all practical purposes, an "informant at large" as in *United States v. Sampol*, 636 F.2d 621 (D.C.Cir.1980). Although West volunteered information on cases unrelated to her role in the Morales/Aviation Activities investigation, *Sampol* presented a much different situation than the present case. In *Sampol*, the informant's sentence—prison or probation—depended solely upon the quality and quantity of information he gave to the prosecutor. With such compelling motivation, he was only too eager to be "accepted by the government as an informant at large whose reports about any criminal activity would be gratefully received" and "'go all out' and 'forge ahead on [his] own' in pursuit of the reward posted by the judge with the approval of the government." *Id.* at 638. In contrast, the government did not ask West to gather information while in custody nor did any government agent pay or promise her anything for providing information. West testified that she was motivated by strong feelings about narcotics due to some family members' substance abuse problems. This self-initiated "crusade" against drug trafficking did not transform West into an informant at large. See e.g., *United States v. Van Scoy*, 654 F.2d 257, 260-61 (3d Cir.), cert. denied, 454 U.S. 1126, 102 S.Ct. 977, 71 L.Ed.2d 114 (1981).

The most recent Supreme Court decision in this line, *Kuhlmann v. Wilson*, ____ U.S. ____, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), in which the Supreme Court found no *Massiah* violation because the informant was "merely listening," differs from this case. In *Kuhlmann*, the government deliberately placed the

informant in a cell with the accused to listen for the desired information. It is clear in this case that the government did not deliberately place West in detention with appellant. In fact, the government agents were not even aware that West was in custody until after her conversation with appellant. Nevertheless, *Kuhlmann* supports our holding in this case. The Court clearly stated that:

the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. [A] defendant does not make out a violation of [the right to counsel] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Id., 106 S.Ct. at 2630.

By "luck or happenstance," appellant was incarcerated with a casual acquaintance who, of her own volition, reported appellant's incriminating statement to the government. The admission of this statement did not violate appellant's sixth amendment rights.

II.

[2] Next, appellant argues that the trial court should have dismissed her second indictment for constitutional speedy trial and due process violations because, although she was arrested on October 28, 1981,

she was not tried until December 12, 1984.¹ Appellant was not, however, under indictment during the entire two year period. She was originally indicted on November 12, 1981; this indictment was dismissed on January 25, 1982. Appellant was reindicted on the same charges on December 15, 1983 and tried on December 12, 1984.² The sixth amendment right to a speedy trial does not apply when the government, acting in good faith, voluntarily dismisses the charges.³ Instead, delay between

¹In her motion to dismiss, appellant included a claim under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* She does not, however, raise this claim on appeal.

²Although appellant's speedy trial and due process claims refer broadly to the three year delay between her arrest on October 28, 1981 and her trial on December 12, 1984, her arguments are directed solely at the delay between dismissal of the first indictment and her subsequent reindictment on the same grounds. On appeal, appellant does not specifically claim that the delay between reindictment in December, 1983 and her trial violated her constitutional speedy trial or due process rights. This delay, almost entirely the result of appellant's pending motions to suppress and motion to dismiss, would not violate her constitutional speedy trial right. See *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

³Even if we agreed with appellant's claim that the government acted in bad faith in dismissing her indictment to avoid revealing West's identity and to eliminate Tony Stewart as a defense witness, she has failed to show a sixth amendment violation. There are four factors to be considered in a speedy trial claim: length of delay, the reason for the delay, the defendant's assertion of her right and prejudice to the defendant resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972). For the reasons discussed in connection with her due process claim, appellant's claim would also fail under this test due to her failure to show any prejudice. Moreover, the record demonstrates that the reason for the delay was to protect the Morales/Aviation

dismissal of the earlier charges and subsequent arrest or indictment must be scrutinized under the due process clause. *United States v. MacDonald*, 456 U.S. 1, 7, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). "To succeed in a due process claim the defendant must show (1) that substantial prejudice resulted because of the government's delay and (2) that the prosecution intentionally employed the delay to obtain a tactical advantage." *United States v. Sanchez*, 722 F.2d 1501, 1509 (11th Cir.), *cert. denied*, 467 U.S. 1208, 104 S.Ct. 2396, 81 L.Ed.2d 353 (1984). See also *United States v. Robinson*, 767 F.2d 765, 768 (11th Cir.1985) (defendant must "show that pre-indictment delay caused actual prejudice to his defense and was a deliberate action by the government designed to gain a tactical advantage.")

[3] Appellant claims she was prejudiced because the government intentionally used the delay to secure an indictment against Tony Stewart in the Morales/Aviation Activities investigation and eliminate him as a defense witness. At the hearing on appellant's motion to dismiss, appellant's attorney proffered the following: Tony Street was expected to testify that he lived in Bimini and had been in contact with Tony Stewart who was a fugitive and refused to come to this country to testify for appellant. (SR1-34). Appellant's counsel then claimed that if Tony Stewart were available, he would refute West's testimony that appellant told her

(Footnote 3 Continued)

Activities investigation, not to hamper appellant's defense. Such a reason is weighed "less heavily" against the government in considering speedy trial claims. *Id.* at 531, 92 S.Ct. at 2192.

Tony Stewart put the cocaine on the boat.⁴ The district court refused to dismiss the indictment, finding there was nothing in the record to indicate that Tony Stewart would have appeared or testified as appellant suggested and that there was no basis to conclude the government was aware that appellant would call Stewart as a witness. (SR1-35-39). We also conclude that appellant's unsupported allegations do not demonstrate any prejudice to her defense as a result of the delay between indictments.

III.

[4] Finally, appellant argues that the district court erred in admitting testimony regarding entries in appellant's diary which was seized on the boat. A Drug Enforcement Administration agent testified that various diary notations from July 6, 1981 through August 10, 1981, reflected drug transactions involving small quantities of cocaine.⁵ Appellant contends that this extrinsic offense evidence was inadmissible under Fed.R.Evid. 404(b) because the transactions were too remote in time, the amounts were significantly smaller than in the charged offenses and the diary entries mentioned individuals not implicated in the charged offenses.

A trial court has broad discretion in determining the admissibility of evidence; its ruling will not be disturbed on appeal absent an abuse of discretion. *See,*

⁴In fact, at trial, West did not testify that appellant told her Tony Stewart had put the cocaine on the boat, but rather that he "had brought some stuff down to go on the boat." (SR3-171-72).

⁵Appellant does not contend that the diary entry testimony was inaccurate or insufficient for the jury to find that she committed the extrinsic offenses.

e.g., *United States v. Williford*, 764 F.2d 1493, 1497 (11th Cir. 1985). The admissibility of extrinsic offense evidence under Fed.R.Evid. 404(b) requires application of a two-part test: "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403." *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir.1978) (en banc), *cert. denied* 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

The government claims that the diary entry testimony was relevant to the issue of intent. Where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses. *Beechum*, 582 F.2d at 911. The diary entries show that appellant was dealing in street level amounts of cocaine. The DEA agent testified, as an expert, that a person involved in kilogram drug deals can and does deal in small quantities. Although the amounts noted in the diary entries were substantially smaller than the quantity of cocaine appellant was charged with importing, the extrinsic and charged offenses show a similar willingness to traffic in cocaine. *See, e.g.*, *Williford*, 764 F.2d at 1498. We thus find the extrinsic offense evidence was relevant to the issue of intent.

As to the second part of the test, probative value is measured by the overall similarity of the extrinsic and charged offenses, but the elements of the offenses need not be equivalent. *Beechum*, 582 F.2d at 915. Instead, the court must make a common sense assessment. *Id.* at 914.

Whether the extrinsic offense is sufficiently similar in its physical elements so that its probative value is not substantially outweighed by its undue prejudice is a matter within the sound discretion of the trial judge. The judge should also consider how much time separates the extrinsic and charged offenses: temporal remoteness depreciates the probity of the extrinsic offense.

Id. at 915. The extrinsic offense testimony showed that appellant engaged in street-level cocaine transactions approximately three-to-four months before her arrest for importing five pounds of cocaine. As discussed above, the extrinsic offenses were very similar to the charged offenses in their overall purpose—trafficking in cocaine. In light of this similarity, four months' time difference does not reduce the probative value of the extrinsic offense evidence. *See, e.g., United States v. Terebecki*, 692 F.2d 1345, 1349 (11th Cir.1982).

Finally, appellant claims that the prejudicial effect of the extrinsic offense evidence outweighed the probative value because the government did not need it to prove its case. The strength of the government's case on the issue of intent is an important factor in comparing probative value and prejudicial effect. The greater the government's need for evidence of intent, the more likely that the probative value will outweigh any possible prejudice. *United States v. Russo*, 717 F.2d 545, 552 (11th Cir.1983). Appellant's intent was clearly at issue in this case. Here, the government did not have overwhelming evidence of appellant's intent, only circumstantial evidence linking appellant to the cocaine and West's testimony, which the jury may have disbelieved in light of her criminal history. On the other side, the

extrinsic offenses were not so heinous that the jury would be likely to convict appellant for the extrinsic offenses rather than the charged ones and the evidence was unlikely to mislead or confuse the jury. *See e.g., Beechum*, 582 F.2d at 914. Thus, the probative value was not substantially outweighed by prejudicial effect.

We therefore find the district court did not abuse its discretion in admitting the extrinsic offense evidence.

For the reasons stated above we affirm appellant's conviction.

AFFIRMED.

[FILED OCT 23 1986]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5291

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

NANCY HICKS,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING

BEFORE: HILL and ANDERSON, Circuit Judges, and
TUTTLE, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant is
denied

ENTERED FOR THE COURT:

/s/ JAMES C. HILL

United States Circuit Judge

REHG-4
(Rev. 9/85)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-997 Cr-EPS

UNITED STATES OF AMERICA

v.

NANCY ANDRE HICKS,

Defendant.

ORDER

THIS CAUSE is before the Court upon petition of the United States to review an Order of the United States Magistrate suppressing and/or excluding the testimony of one Marilyn Armstrong West. Having reviewed the transcripts of the hearings conducted before this Court on April 3, and May 14, 1984 and the Memorandums of Law submitted by the parties and being otherwise duly apprised in the proceedings the Court makes the following findings of fact:

(1) The defendant, NANCY ANDRE HICKS, was incarcerated at the Dade County Jail, Women's Annex on the afternoon of October 28, 1981 following her arrest by officers of the United States Customs Service.

(2) Marilyn Armstrong West (hereinafter "West") was incarcerated at the Dade County Jail, Women's Annex on October 29, 1981 having surrendered herself before a United States Magistrate relative to a bond revocation matter.

(3) Although West had periodically cooperated with federal law enforcement since 1979, federal law enforcement officers were unaware of West's incarceration on October 29, 1981 until several days later.

(4) On October 29, 1981 West and the defendant conversed while both were in custody. West's conversation with the defendant was not electronically recorded, federal law enforcement officers were not aware of the conversation taking place until several days later and West was not financially reimbursed or otherwise rewarded for providing to federal law enforcement officers allegedly incriminating statements made by the defendant.

(5) West subsequently initiated contact with and provided confidential information to the United States Secret Service beginning on October 30, 1981 and on one occasion on November 4, 1981, wore a recording device when she spoke with another inmate "Koon". The Secret Service never paid West any money for this information, nor made any promises to her. The Secret Service did write two letters on her behalf which are of record.

(6) On October 29, 1981, West was neither an agent of nor an informant for federal law enforcement. West was neither under any orders nor following any instructions or requests by federal law enforcement officers when she conversed with the defendant on October 29, 1981.

This Court finds that on the above facts defendant was not denied her rights under the Sixth Amendment

and the actions of West do not come within the proscription of *Massiah v. United States* 377 U.S. 201 (1969) and its progeny. The Court finds that West was "a neutral fellow inmate", *United States v. Henry*, 447 U.S. 264, 267, fr3 (1977), and is therefore competent to testify to her conversation with the defendant.

Accordingly, it is hereby,

ORDERED AND ADJUDGED that the Report and Recommendation of the United States Magistrate recommending the exclusion and suppression of defendant's statements to West is denied.

IT IS FURTHER ORDERED AND ADJUDGED that Marilyn Armstrong West shall be permitted to testify at the trial of the instant case.

DONE AND ORDERED this 16 day of July, 1984 at Miami, Florida.

/s/ EUGENE P. SPELLMAN
EUGENE P. SPELLMAN
UNITED STATES DISTRICT
JUDGE

Copies furnished to

ROBERT J. BONDI
ASSISTANT UNITED STATES ATTORNEY

MICHAEL D. GELETY, ESQUIRE
1700 E. Las Olas Boulevard
Fort Lauderdale, Florida 33301
Counsel for Defendant Hicks